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VIA ONLINE ELECTRONIC SUBMISSION
(www.regulations.gov - Docket No. EPA-HQ-OW-2017-0203)

Ms. Donna Downing
Office of Water,
Environmental Protection Agency
1200 Pennsylvania Avenue NW.
Washington, DC 20460

Ms. Stacey Jensen,
Regulatory Community of Practice
U.S. Army Corps of Engineers
441 G Street NW., Washington, DC 20314

Re: Comments of Murray Energy Corporation on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules 82 Fed. Reg. 34899 (July 27, 2017)

Dear Ms. Downing and Ms. Jensen:

Murray Energy Corporation ("MEC") is pleased to provide these comments on the proposed rule: Definition of "'Waters of the United States'("WOTUS") - Recodification of Pre-existing Rules."[1] ("Proposed Rule"). We commend the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") for taking the only logical step

[1] 82 Fed. Reg. 34,899 (July 27, 2017)

available to undo the damage caused by the Obama Administration's Clean Water Rule: Definition of "Waters of the United States."[2] ("2015 WOTUS Rule"). MEC strongly supports the rescission of the 2015 WOTUS Rule and the proposed recodification of the definition of WOTUS that was in place prior to the 2015 Rule.

MEC (along with its Subsidiary Companies) is the largest privately-owned coal company in the United States. MEC employs over 5,200 Americans and currently operates eleven active coal mines, consisting of ten underground longwall mining systems and forty-six continuous mining units in Ohio, Illinois, Kentucky, Utah, and West Virginia. We produce approximately seventy-five million tons of high quality bituminous coal each year and hold approximately five billion salable tons of coal in reserves.

MEC addressed the fundamentally flawed 2015 WOTUS Rule at every opportunity. MEC provided extensive public comments on the draft 2015 WOTUS Rule and coordinated closely with the National Mining Association to educate EPA and the Corps on the many problems with the rule as drafted and applied. In spite of the immense weight of opposing comments, the Obama Administration finalized the 2015 WOTUS Rule, thereby forcing MEC and its allies to file legal challenges in courts all across the country. MEC's first-to-file lawsuit in the Sixth Circuit Court of Appeals led to the nationwide stay of the rule on October 9, 2015, in *Murray Energy Corp. et al., v. EPA, et al.* Although the definition in place prior to the 2015 WOTUS Rule is currently being used due to the Sixth Circuit's stay, recodifying the definition will decrease uncertainty and provide an independent interpretation as court battles over the appropriate jurisdiction to hear the appeal of the 2015 WOTUS Rule continue.

[2] 80 Fed. Reg. 37,054 (June 29, 2015)

MEC supports, endorses, and incorporates herein the comments submitted by the National Mining Association on the Proposed Rule. However, we also wish to take this opportunity to highlight the mining-specific impacts of interpretations of WOTUS.

Certain naturally-occurring water features are ubiquitous in the Appalachian coalfields such as headwater and ephemeral streams, gullies and swales, natural drainages and other natural conveyances. The mining activities authorized by the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") often result in diffuse land-disturbances and as a result frequently encounter these water features. The U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("OSM"), which is the responsible agency for regulating coal mining operations under SMCRA, has a long history of interpreting and applying the federal WOTUS definition, and has routinely found these unique natural features to be non-jurisdictional waters.[3] OSM's many rulemakings applying WOTUS highlight the importance of this definition to the mining industry and the significant impact that changes in this definition can have on OSM's regulatory program.

OSM's historic interpretation of WOTUS has strong public policy and scientific underpinnings. In the public policy context, OSM has consistently applied Congressional intent to its application of WOTUS. In the context of defining "navigable waters," it is obvious that Congress never could have intended for "navigable waters" to extend to ephemeral waters that, by definition, are not navigable, and are primarily insignificant dry ditches. Further, OSM has consulted other agencies in its rulemaking processes to solicit input so that OSM would be uniformly applying WOTUS. For example, in 1979 regulations implementing SMCRA, OSM

[3] *See. e.g.*, Final Stream Protection Rule, 81 Fed. Reg. 93,066, 93,086 (Dec. 20, 2016) ("Our previous rules included no protections for ephemeral streams.")

considered input from the U.S. Geological Survey, in which OSM determined that a more limited definition of ephemeral streams than the U.S. Geological Survey had recommend was appropriate.[4] The definition of WOTUS is applied extensively throughout SMCRA, such that OSM's implementing regulations require a clear boundary between jurisdictional and non-jurisdictional waters. OSM went to great lengths to elaborate on its interpretations of WOTUS in the preamble of its rules. For example, one of the reasons for OSM's 1983 Stream Buffer Zone rule was OSM's need to revise its 1979 "biological-community criterion" so that it would not be improperly applied by operators to ephemeral streams. "The biological-community standard was confusing to apply since there are areas with ephemeral surface waters of little biological or hydrologic significance which, at some time of the year, contain a biological community" finding that operators were applying the rule's standards "to springs, seeps, ponding areas, and ephemeral streams" which was never intended by OSM.[5] However, even the 1979 regulations recognized that ephemeral streams do not warrant the same level of protection as intermittent and perennial streams.[6]

From a scientific perspective, OSM has long-recognized that ephemeral stream conditions change seasonally and from year to year depending on weather conditions and that stream quality and quantity can vary substantially and can be difficult to accurately gauge for any given period of time. In excluding ephemeral stream from regulation in the 1983 Stream Buffer Zone Rule, OSM concluded that "the purposes of [SMCRA] will best be achieved by providing a buffer zone for those streams with more significant environmental- resource

[4] 44 Fed. Reg. 14,902, 14,932 (Mar. 13, 1979)
[5] 48 Fed. Reg. 30,312, 30,313 (June 30, 1983).
[6] 44 Fed. Reg. 14,902, 14,929 (Mar. 13, 1979) ("Ephemeral Stream. This term is defined to distinguish between intermittent streams and those streams which have less frequent flow of water. Ordinarily, less elaborate provisions for protection of the latter are needed to fulfill the mandate of the Act to protect the hydrologic balance.").

values."[7] OSM recognized that ephemeral surface waters have little biological or hydrological significance and do not typically support benthic macroinvertebrates because they are dry for significant times of the year. This is consistent with previous EPA and Corps determinations that jurisdiction over "puddles" is not contemplated by the CWA.[8]

Despite this long history, the Obama Administration caused OSM to rely on the 2015 WOTUS Rule in its 2016 Stream Protection Rule, which significantly changed OSM's regulatory approach to ephemeral streams. In the preamble to the Stream Protection Rule, OSM stated that "[b]ased upon additional scientific information developed over the last 30 years, we no longer concur with [our prior] characterization of the significance of ephemeral streams."[9] Importantly, this decision represented OSM's blind reliance on EPA's dubious scientific basis in the 2015 WOTUS Rule. Unlike its previous applications of WOTUS, OSM was unable to articulate its own scientific rationale for regulating ephemeral streams in the Stream Protection Rule. Of course, this was far from the only flaw with the Stream Protection Rule. Indeed, the numerous, compounding missteps in the rule prompted extensive opposing comments by Murray Energy Corporation, the National Mining Association, and others, as well as legal challenges. These actions underscore just how badly flawed the 2015 WOTUS Rule was and the direct ripple effect it had on other programs like SMCRA. The 2015 WOTUS Rule created such a sea of change in the context of SMCRA implementation that Congress was forced to intervene using the Congressional Review Act to quash OSM's Stream Protection Rule, which if allowed to

[7] 48 Fed. Reg. 30,312, 30,313 (June 30, 1983).
[8] *See* 79 Fed. Reg. 22,188, 22,218 (April 21, 2014) ("'puddles'" is not a sufficiently precise hydrologic term or a hydrologic feature capable of being easily understood.").
[9] 80 Fed. Reg. 44,436, 44,448 (July 27, 2015).

stand would have created chaos for both the regulatory community and administrative agencies.[10]

Given the significant impact the definition of WOTUS has on SMCRA, it is critical that EPA and the Corps rescind the 2015 WOTUS Rule and ensure that any future proposed rule explicitly addresses the implications on other programs and the critical importance of excluding ephemeral streams from the definition, consistent with OSM's historic practice.

Likewise, EPA and Corps must ensure that any future rule is consistent with the Supreme Court's opinion in *Rapanos v. United States*,[11] as required by the February 28, 2017, Presidential Executive Order on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." More specifically, EPA and the Corps should not only consider, but should adopt the late Justice Antonin Scalia's opinion in that case, rather than Justice Kennedy's "significant nexus" test in his concurring opinion. Notably, the 2015 WOTUS Rule strayed far beyond even Justice Kennedy's test because of its blanket inclusion of all ephemeral streams without regard for their connection, or nexus, to other regulated waters.

EPA and the Corps should also consider additional mining-specific issues in any future rulemaking. Mining operations often require on-site stormwater and surface water management features such as diversion ditches, slurry ponds, and sediment impoundments. Any future rulemaking must explicitly exempt such features, along with all manmade features, from being jurisdictional. EPA and the Corps should avoid the regulation of ditches in any future rulemaking.

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[10] *See* Public Law 115-5 (Feb. 16, 2017).
[11] *Rapanos v. United States*, 547 U.S. 715 (2006).

MEC appreciates the opportunity to provide feedback on this critical first step in rescinding the 2015 WOTUS Rule and clearing the path for a new common-sense rule that comports with the statutory requirements of the Clean Water Act.

Sincerely,

C. Crellin Scott

C. Crellin Scott
Director of Regulatory Affairs
Murray Energy Corporation